INFORMATION SHEET
DETERMINATIONS OF NO JURISDICTION FOR ISOLATED, NON-NAVIGABLE, INTRA-STATE WATERS RESULTING FROM U.S. SUPREME COURT DECISION IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. U.S. ARMY CORPS OF ENGINEERS

DISTRICT OFFICE: Philadelphia

FILE NUMBER: CENAP-OP-R-200501419

REGULATORY PROJECT MANAGER: Kevin W. Dougherty Date: February 22, 2006

PROJECT REVIEW/DETERMINATION COMPLETED: In the office N (Y/N) Date:
At the project site Y (Y/N) Date: November 22, 2005

PROJECT LOCATION INFORMATION:

State: Pennsylvania

County: Lehigh

Center coordinates of site by latitude & longitudinal coordinates: 40-36-06 N-75-34-57.66 W

Approximate size of site/property (including uplands & in acres): 41.671

Name of waterway or watershed: Little Cedar Creek (Lehigh River)

SITE CONDITIONS:

Type of aquatic resource[1]	0-1 ac	1-3 ac	3-5 ac	5-10 ac	10-25 ac	25-50 ac	> 50 ac	Linear feet	Unknown
Lake	☐	☐	☐	☐	☐	☐	☐	☐	☐
River	☐	☐	☐	☐	☐	☐	☐	☐	☐
Stream	☐	☐	☐	☐	☐	☐	☐	☐	☐
Dry Wash	☐	☐	☐	☐	☐	☐	☐	☐	☐
Mudflat	☐	☐	☐	☐	☐	☐	☐	☐	☐
Sandflat	☐	☐	☐	☐	☐	☐	☐	☐	☐
Wetlands	0.07 ac	☐	☐	☐	☐	☐	☐	☐	☐
Slough	☐	☐	☐	☐	☐	☐	☐	☐	☐
Prairie pothole	☐	☐	☐	☐	☐	☐	☐	☐	☐
Wet meadow	☐	☐	☐	☐	☐	☐	☐	☐	☐
Playa lake	☐	☐	☐	☐	☐	☐	☐	☐	☐
Vernal pool	☐	☐	☐	☐	☐	☐	☐	☐	☐
Natural pond	☐	☐	☐	☐	☐	☐	☐	☐	☐
Other water (identify type) _____	☐	☐	☐	☐	☐	☐	☐	☐	☐

[1]Check appropriate boxes that best describe type of isolated, non-navigable, intra-state water present and best estimate for size of non-jurisdictional aquatic resource area.

Migratory Bird Rule Factors[1]:	If Known		If Unknown Use Best Professional Judgment		
	Yes	No	Predicted to Occur	Not Expected to Occur	Not Able To Make Determination
Is or would be used as habitat for birds protected by Migratory Bird Treaties?	☐	☐	☒	☐	☐
Is or would be used as habitat by other migratory birds that cross state lines?	☐	☐	☒	☐	☐
Is or would be used as habitat for endangered species?	☐	☐	☐	☒	☐
Is used to irrigate crops sold in interstate commerce?	☐	☒	☐	☐	☐

[1]Check appropriate boxes that best describe potential for applicability of the Migratory Bird Rule to apply to onsite, non-jurisdictional, isolated, non-navigable, intra-state aquatic resource area.

TYPE OF DETERMINATION: Preliminary ☐ Or Approved ☒ .

ADDITIONAL INFORMATION SUPPORTING NJD (e.g., paragraph 1 – site conditions; paragraphs 2-3 – rationale used to determine NJD, including information reviewed to assess potential navigation or interstate commerce connections; and paragraph 4 – site information on waters of the U.S. occurring onsite):

1. SITE CONDITIONS

a. The property consists of a mixture of active agricultural fields (corn), hedgerows and a group of existing structures underlain by well drained (Washington and Ryder Series) soils. There is an area mapped as the poorly drained Melvin Series located in the southwestern corner of the site. Most of the area underlain by this soil is currently part of either the roadside verge or is part of a roadside hedgerow. Surrounding land use is primarily rural residential and agricultural. A railroad right-of-way lies along the southern border of the tract. Review of the aerial photography in the Soil Survey for Lehigh County Pennsylvania (1963) shows that nearly the entire tract was cultivated at the time of the base photography (1962). The 1962 photography as annotated in the Soil Survey does not identify any streams or other drainage features on the property; an existing grassed swale on the property was mapped as a swale underlain by moderately well drained Bedford series soils but was cultivated at the time of the survey.
b. Topographically the property lies nearly on a series of gently rolling hills that generally slope down to the south and southwest. The existing structures are located on a narrow bench along the sideslope.
c. Two areas are identified on the site as wetlands according to the criteria of the 1987 Corps of Engineers Wetland Delineation Manual. One of these areas is a water of the United States as it is a wetland contiguous with small ephemeral stream that is part of the surface tributary system of a water of the United States. One 0.07 acre area of emergent wetland in a depression is isolated and without a nexus to interstate or foreign commerce and therefore is not a water of the United States.

2. RATIONALE FOR DETERMINATION

a. The excluded area is a small (0.07 acre) emergent wetland located in a depression formed by an elevated hedgerow that lies parallel to Blue Barn Road and a second narrow ridge (possibly an old farm road) perpendicular to the hedgerow . Based on the field data, the area is a seasonally saturated closed catchment located between the two ridges but it had no channel connection to any watercourse. At its closest point, the wetland is approximately 80 feet from the ephemeral tributary located along the side of Blue Barn Road and approximately 150 feet from a second ephemeral/intermittent channel located off-site to the south. Additionally, the depression lies approximately 3-4 feet lower than either of the two streams thereby making a connection by overland flow to either stream improbable as the depression would need to fill with 3-4 feet of water before any overland flow could occur. Based upon the lack of physical connection with either stream or their adjacent wetlands, then the depression is neither contiguous nor bordering a water of the United States. Further considering that: 1) the distance separating this wetland from a surface tributary relative to the size of each; 2) that either tributary at this point is very small (1-3 feet wide); and, 3) that an overland connection under normal circumstances the between the wetland and either tributary is improbable, then the wetland is not neighboring. As it is not neighboring, bordering or contiguous with either of the unnamed tributaries, it is not an adjacent wetland but is an isolated, intrastate wetland.
b. To determine if jurisdiction could be asserted the following factors were considered:
1. As the area has no permanent standing water, only shallow seasonal ponding then the depression could not support for any type of vessel. The area is therefore not navigable in fact.
2. The small size of the wetland and the lack of any unusual properties make it unlikely that the wetland could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The wetland supports neither fish nor shellfish and water from it could be used neither to irrigate crops nor for industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). The wetland does not contain merchantable timber, there are no known mineral deposits, and the area does not contain sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)).
c. Based upon the factors considered above, the wetland is an isolated, intrastate wetland with no nexus to interstate or foreign commerce. As such, pursuant to 33 CFR 328.3, it is not a water of the United States, and is not subject to Section 404 of the CWA.

3. WATERS OF THE UNITED STATES

a. One small (0.009 acre) area along Blue Barn Road was identified that contained a channel with Ordinary High Water (OHW) line and portions met the 1987 Corps Manual criteria for identification as wetlands. This area was delineated by flags W-52 through W-66 and included an ephemeral channels (less than 1 foot wide and generally less than 0.5 feet deep) connected to a continuous roadside swale that met the wetland criteria of the 1987 Corps of Engineers Manual. The ephemeral channel flows south and is carried under two driveways by small culverts. The channel eventually flows into an unnamed perennial tributary to Little Cedar Creek located approximately 500 feet south of the southwestern property corner. Little Cedar Creek is tributary to Cedar Creek which is tributary to the Little Lehigh Creek. The Little Lehigh Creek is tributary to the Lehigh River, an intrastate, navigable water of the United States pursuant to 33 CFR 328.3(a)(1). The Lehigh River is tributary to the Delaware River, an interstate navigable water of the United States pursuant to 33 CFR 328.3(a)(1) and 33 CFR 329.4. Thus the ephemeral channel on the site is part of the surface tributary system of a water of the United States and is therefore a water of the United States pursuant to 33 CFR 328.3(a)(5). The wetland contiguous with this channel is therefore a wetland adjacent to a water of the United States (33 CFR 328.3(c)). Adjacent wetlands are waters of the United States pursuant to 33 CFR 328.3(a)(7).

4. OTHER COMMENTS

A linear feature identified from the topographic survey and from aerial photography was examined in the field. This feature was found to be a grassed swale in an agricultural field that terminates in a shallow rill. The swale and rill do not have a direct surface connection to a water of the United States but dissipated into sheet flow once slopes decreased to less than 3-5%. The swale and rill was determined to be an upland erosional feature. A depression containing a predominance of hydrophytic vegetation was observed along the side of an agricultural field near the southeastern property line. Soils in the area were moderately well drained and non-hydric; as such the area was identified as an upland.